MAR 20 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1165~~ 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

INDEX

PETITION:

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Treaty Involved	3
Statement	3
Reasons for Granting the Writ	7
Conclusion	18
Certificate of Service	19

TABLE OF AUTHORITIES

Cases:

Atlantic & Gulf Stevedores, Inc. v. *Ellerman Lines, Ltd.*, 369 U.S. 355 (1962) 17

Bacardi Corp. v. *Domenech*, 311 U.S. 150 (1940) 7

De Geofroy v. *Riggs*, 133 U.S. 258 (1890) 7

Eck v. *United Arab Airlines, Inc.*, 20 A.D. 2d 454 (1st Dep't 1964), *rev'd on other grounds*, 15 N.Y. 2d 53 (1964) 14

Factor v. *Laubenheimer*, 290 U.S. 276 (1933) 7

Grey v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D. N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956) 9, 14

PAGE

Kolovrat v. *Oregon*, 366 U.S. 187 (1961) 7

Manufacturers Hanover Trust Co. v. *American Airlines, Inc.*, 23 A.D. 2d 832 (1st Dep't. 1965) 14

Mertens v. *The Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965) 12

Nielsen v. *Johnson*, 279 U.S. 47 (1929) 7

Pan American World Airways, Inc. et al., Conditions of Carriage and Related Traffic Regulations, 24 C.A.B. 575 (1957) 16

Preston v. *Hunting Air Transport, Ltd.*, 1956 U.S. Av. R. 1 (Q.B.D. 1956) 14

Samuel Montague & Co. v. *Swiss Air Transport Co.* [1966], 1 Lloyd's Rep. 323 14

Santovincenzo v. *Egan*, 284 U.S. 30 (1931) 7

Seth v. *British Overseas Airways Corporation*, 329 F.2d 302 (1st Cir. 1964), *cert. denied*, 379 U.S. 858 (1964) 14, 16

Valentine v. *United States*, 299 U.S. 5 (1936) 7

Warren v. *The Flying Tiger Line, Inc.*, 352 F. 2d 494 (9th Cir. 1965) 12

Constitutions, Statutes, Treaties:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929. 49 *Stat.* 3000; T.S. 876 ..... *passim*

Title 28 *U.S.C.* §1254 (1) 2

Title 28 *U.S.C.* §1292 (b) 4

PAGE

Title 28 *U.S.C.* §1332 (a) 3

U.S. Constitution, art. VI cl. 2 7

U.S. Constitution, Seventh Amendment 17

Other Authorities:

IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838 ..... 10, 11

I International Conference on Private Air Law, ICAO Doc. 7686—LC/140 ..... 12, 13

S. Exec. Doc. H, 86th Cong., 1st Sess. (1959) 13

S. Exec. Rept. No. 3, 89th Cong. 1st Sess. (1965) 13

Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967) 13

Drion, Limitation of Liabilities in International Law (1954) 14

Shawcross and Beaumont, Air Law (2nd ed. 1951) 14

Goedhuis, National Airlegislations and the Warsaw Convention (1937) 14

U.S. Dept. of State, Pub. No. 8188, *Treaties in Force* 235 (1967) 14

32 J. Air L. & Com. No. 2, p. 243 (1966) 7

House of Commons: 740 Official Report 139 (8 Feb. 67) Col. 1569-1593 ..... 15, 16

INDEX TO APPENDIX:

APPENDIX A — PAGE

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929. 49 *Stat.* 3000, *et seq.*; T. S. 876 1

APPENDIX B

Opinion of U.S. Court of Appeals dated December 16, 1966 13

Prevailing Opinion by Kaufman, *J.* 14

Dissenting Opinion by Moore, *J.* 24

Judgment in *Lisi* v. *Alitalia* 26

Judgment in *Maiorano* v. *Alitalia* 28

Judgment in *Como* v. *Alitalia* 30

Judgment in *Cologgi* v. *Alitalia* 32

Judgment in *DiBiase* v. *Alitalia* 34

Memorandum Opinion Denying Petition for Rehearing 36

Order Denying Petition for Rehearing 37

Memorandum Opinion Denying Petition for Rehearing *in banc* 39

Order Denying Petition for Rehearing *in banc* 40

Order Granting Stay of Issuance of Mandate 42

Opinion by MacMahon, *D.J.* 43

APPENDIX C

House of Commons: 740 Official Report 139 (8 Feb. 67) Col. 1569-1593 54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cases on December 16, 1966.*

Citations to Opinions Below

The opinion of the District Court (R. 39a), printed in Appendix B,** p. 43, is reported in 253 F. Supp. 237. The opinion of the Circuit Court of Appeals (R. 64a), printed in Appendix B, p. 13, is reported in 370 F. 2d 508.

---

* Additional respondents are Rocco Cologgi, Nicolina Como, Rosina DiBiase and Joseph Maiorano.

** Because of the voluminous appendix, it is separately presented. SUP. CT. R. 23.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on December 16, 1966. R. 76a-84a; Appendix B, pp. 26-35. Timely petitions for rehearing and rehearing *in banc* were denied on February 6, 1967. R. 113a-119a; Appendix B, pp. 36-41. A thirty day stay of the issuance of the mandate was granted by the Circuit Court of Appeals on February 20, 1967. R. 125a-127a; Appendix B, p. 42.

The jurisdiction of this Court is invoked under 28 *U.S.C.* §1254(1).

Questions Presented

1. Does the Warsaw Convention, a Treaty of the United States,[1] require that actual notice of the legal limitation of an air carrier's liability for personal injury or death of a passenger, set forth in Article 22 thereof, be given to passengers before it becomes binding?

2. Does the sanction in Article 3(2) of the Warsaw Convention,[2] depriving an air carrier of the benefit of the Treaty defenses which exclude or limit its liability where no passenger ticket is delivered, likewise apply where the passenger ticket is delivered but fails to contain a readable notice that the Treaty limits the carrier's liability in the event of injury to or death of a passenger?

3. Does the statement in the baggage checks delivered by petitioner, as to the applicability of the liability rules

---

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929. Adherence by the United States was declared June 27, 1934, and became effective October 29, 1934. 49 *Stat.* 3000; T.S. 876.

[2] Hereinafter reference will merely be to relevant Articles of the Convention.

of the Warsaw Convention, satisfy the mandatory requirements of Articles 4(3)(h) and 4(4)?

4. Should the question of the readability of the passenger ticket and baggage check be submitted to a jury?

Treaty Involved

The provisions of the Warsaw Convention involved are Articles 1, 3, 4, 8, 9, 20 and 22. The full text of these Articles in the official French and also in English, are printed in Appendix A, pages 1 to 12.

Statement

Respondents commenced five suits, which were consolidated in the District Court, to recover damages for wrongful death, personal injuries, and property damage allegedly sustained by thirteen passengers on petitioner's aircraft which crashed shortly after take-off from Shannon, Ireland on February 26, 1960. (R. 65a). The aircraft was en route from Rome to New York. (R. 65a). Respondents are citizens of the State of New York, and petitioner is an Italian corporation with its principal place of business in Rome, Italy. (R. 65a). Jurisdiction of the District Court is based upon diversity of citizenship, 28 *U.S.C.* §1332(a) (2).

Each of these passengers was traveling pursuant to a passenger ticket which provided for "international transportation" within the meaning of Article 1 of the Warsaw Convention. (R. 19a-25a). In answering the separate Complaints, petitioner pleaded several affirmative defenses based upon Articles 20 and 22 of the Treaty which serve to exclude or limit petitioner's liability for the damage alleged. (R. 4a-9a). Prior to trial, respondents moved for

partial summary judgment dismissing these affirmative defenses, asserting that petitioner had failed properly to notify the passengers of the applicability of the Treaty to their transportation, and that, therefore, the provisions of the Treaty excluding or limiting liability were unavailable. (R. 10a-18a). The District Court agreed with respondents and granted their motion. (R. 39a-49a). The opinion of the District Court included a certification that the decision involves a controlling question of law concerning which there is substantial ground for difference of opinion. (R. 48a-49a). Pending disposition of this question by the Circuit Court of Appeals, the trial on damages was stayed by the District Court. (R. 49a). Petitioner's application for leave to appeal pursuant to 28 U.S.C. §1292 (b) was granted by the Circuit Court of Appeals on April 14, 1966. (R. 66a).

By a vote of two to one, with a strong dissenting opinion by Judge Moore, the Circuit Court of Appeals affirmed the judgment of the District Court. A petition for rehearing by the original panel was denied by the same vote of two to one. (R. 113a-115a). Rehearing *in banc* was denied by a vote of six to three, Judges Moore, Friendly and Hays voting to grant. (R. 117a-119a).

Both in the District Court and in the Court of Appeals, respondents contended that the limitation of liability contained in the Warsaw Convention is not binding on a passenger unless he has been given prior actual notice that the Treaty limits the carrier's liability in the event of an accident. Respondents argued that this position is supported by Article 3(1) of the Convention, which lists as one of the particulars to be included in the passenger ticket a statement that the transportation is subject to the rules relating to liability established by the Convention. Finally, they contended that the passenger tickets delivered

by petitioner did not contain "adequate notice" because the statement in the tickets as to the applicability of the rules of the Convention was not definite, noticeable, readable and understandable to a layman.

Petitioner contended in the courts below that the Treaty does not require that notice of the Convention limits of liability be given before they become binding in the case of injury to or death of a passenger. Article 3(1) merely lists the particulars to be included in the passenger ticket. The Treaty does not impose any penalty or sanction upon the carrier if the passenger ticket omits any of these listed particulars. The only sanction in the Treaty relating to the passenger ticket is contained in Article 3(2), which deprives the carrier of the benefit of the provisions excluding or limiting liability *if the carrier accepts a passenger without a passenger ticket having been delivered.*

Petitioner urged that Article 3(1) must be read in conjunction with related Articles of the Treaty which deal with other transportation documents, that is, the baggage check and the air waybill. Article 4, dealing with the baggage check and Article 9, which deals with the air waybill, deprive the carrier of the benefit of the limitation of liability where no baggage check or air waybill is delivered, *or* if the document delivered fails to contain a statement that the transportation is subject to the liability rules of the Convention. There is no similar alternative provision in Article 3(2) which deals with the passenger ticket. Article 3(2) limits by its express words the imposition of the penalty to cases of non-delivery of a ticket.

Petitioner drew the attention of the Court below to the fact that the drafters of the Treaty had considered extending the penalty in Article 3(2) to cover the situation where the passenger ticket omitted any of the particulars listed

in Article 3(1). This would have rendered Article 3 uniform with Articles 4 and 9 in this regard. However, after consideration by the delegates to the Convention, this proposal was expressly rejected. Petitioner contended that, in any event, the passenger tickets and baggage checks delivered contained all of the particulars listed in Articles 3 and 4 of the Convention.

The majority of the Court below rejected a literal reading of the plain language of the Treaty, and at the same time wholly disregarded the unequivocal intent of the parties to the Treaty as clearly expressed in the "legislative history" thereof.

The majority decision of the Court below holds that the legal limitation of liability contained in the Warsaw Convention does not apply unless prior actual notice has been given to the passenger that the carrier's liability is limited by the Treaty. The decision further holds that the sanction in Article 3(2) applies not only where no passenger ticket is delivered, but also where the ticket delivered fails to contain one of the particulars listed in Article 3(1).

Finally, the majority of the Court below held that the tickets and baggage checks herein—the standard airline passenger tickets and baggage checks in daily use throughout the world for over 15 years—did not give adequate notice of the Treaty's limitations of liability because they were printed in type too small to be readable.

Reasons for Granting the Writ

1. The majority decision of the Court below has interpreted a Treaty of the United States, the supreme Law of the land,[3] in direct conflict with the plain language of the Treaty, the clear intent of the parties to the Treaty as shown in the "legislative history", the official position of the Executive Branch of the United States Government, and finally, in conflict with every reported authority which has ever considered the same point. This decision so defeats the scheme of the Warsaw Convention as to result in virtual denunciation of this Treaty, a step which the United States Government refused to take in May, 1966.[4]

As so accurately characterized by Judge Moore in his strong dissenting opinion:

> "The majority in their opinion indulge in judicial treaty-making.
>
> • • • • •
>
> "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a 'one-sided advantage' is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability." (R. 74a).

The majority of the Court below have so far exceeded the permissible limits of treaty interpretation[5] as to re-

---

[3] U.S. CONST. art. VI cl. 2.

[4] 32 J. AIR L. & COM. No. 2, p. 243 (1966).

[5] Delineated by decisions of this Court over many years. See, *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961); *Bacardi Corp.* v. *Domenech*, 311 U.S. 150 (1940); *Valentine* v. *United States*, 299 U.S. 5 (1936); *Factor* v. *Laubenheimer*, 290 U.S. 276 (1933); *Santovincenzo* v. *Egan*, 284 U.S. 30 (1931); *Nielsen* v. *Johnson*, 279 U.S. 47 (1929); *De Geofroy* v. *Riggs*, 133 U.S. 258 (1890).

quire the exercise by the Supreme Court of its supervisory powers, if the reputation of the United States for good faith, honor, and integrity in dealing with other nations is to be preserved.

(a) The language of the Warsaw Convention is clear on its face. The majority of the Court below, however, found the words of the Treaty to be a "'verbal prison'" and proceeded to interpret the Treaty in complete disregard of the plain language thereof. Again, in the words of Judge Moore:

> "Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem." (R. 74a).

Article 3(2) of the Convention, in plain, simple, concise language, imposes upon a carrier the severe and unusual penalty of absolute liability for personal injury or death of its passengers, and without limitation as to damages, "if the carrier accepts a passenger without a passenger ticket having been delivered." 49 *Stat.* 3015. This is the only circumstance listed in Article 3(2) justifying the imposition of this penalty. Nevertheless, the majority of the Court below have held that the penalty in Article 3(2) applies not only in cases of non-delivery, but also where the ticket delivered does not contain a noticeable and readable statement that the transportation is subject to the liability rules of the Convention.

This holding is in direct conflict with the intent of the parties to the Treaty, as clearly expressed in Article 3, and the corollary Articles 4, 8 and 9. Article 3(1) lists the particulars to be included in the passenger ticket. One of these is a statement that the transportation is subject to the liability rules established by the Conven-

tion. Article 3(1)(e), 49 *Stat.* 3015. With respect to the transportation of baggage and cargo, Articles 4(3)(h) and 8(q) specify the identical statement as one of the particulars to be included in the baggage check and air waybill, respectively. 49 *Stat.* 3015, 3016.

If the carrier "accepts a passenger without a passenger ticket having been delivered," the carrier cannot avail itself of the provisions of the Convention excluding or limiting liability. Article 3(2), 49 *Stat.* 3015. Similarly, if no baggage check is delivered, or if no air waybill is made out, the carrier cannot avail itself of the provisions of the Convention excluding or limiting liability for baggage or cargo losses. Article 4(4), 49 *Stat.* 3015; Article 9, 49 *Stat.* 3017. There the similarity between the requirements for the passenger ticket and the baggage and cargo documents ends.

For, while Articles 3(2), 4(4) and 9 all impose the sanction of absolute unlimited liability in cases of non-delivery, Articles 4(4) and 9 *in addition* expressly impose the sanction *if the baggage check and air waybill fail to contain any of the particulars required, one of which is a statement that the transportation is subject to the liability rules of the Convention.* But in the case of the passenger ticket, Article 3(2) lists only the case of non-delivery as the basis for the imposition of this sanction.

This very important distinction between the scope of the sanctions in Articles 3(2), 4(4) and 9 was recognized in *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956). There the District Court held that the mere omission of one of the particulars listed in Article 3(1) from the passenger ticket did not render the penalty of Article 3(2) for non-delivery applicable. The District Court relied heavily on the clear intent of

the parties to the Treaty as expressed in the contrasting sanctions in Articles 3(2), 4(4) and 9. The Court of Appeals affirmed upon the basis of the opinion of the District Court.

Now, the majority decision of the Court below, without overruling *Grey* but by characterizing petitioner's reliance thereon as "misplaced", holds that the failure to include one of the particulars listed in Article 3(1) in the passenger ticket in readable type renders the non-delivery penalty of Article 3(2) applicable.

(b) Examination of the history of the drafting of Article 3 of the Warsaw Convention confirms in unmistakable terms that the sanction in Article 3(2) does not apply merely because the passenger ticket omits any of the particulars listed in Article 3(1). Petitioner urged the Court to examine this history, yet the decision of the majority makes no reference thereto.

The preliminary draft of Article 3 prepared by CITEJA[6] in 1928, contained the following sanction:

> "If, for an international journey, the carrier accepts a passenger without having delivered a passenger ticket, *or if the ticket does not contain the particulars indicated above,* the contract of transportation will none the less be subject to the rules of this Convention, but the carrier will not be entitled to avail himself of those provisions of this Convention which exclude in whole or in part his liability direct or derived from the omissions of his agents."[7]

The drafting committee at the Warsaw Conference decided, however, that the words, *"or if the ticket does not*

---

[6] Comité International Technique d'Experts Juridiques Aériens.

[7] II^ème^ Conference Internationale de Droit Prive Aerien, ICAO Doc. 7838, p. 168 (1930). (Translation and emphasis ours.)

contain the particulars indicated above", be deleted. The following excerpts from the Minutes of the Conference clearly demonstrate the intent of the drafters:

> "M. de Vos, Reporter. Gentlemen, Article 3 relates to the passenger ticket and what should be found on the ticket.
>
> • • • • •
>
> "But because of the observation by the Greek delegate, which is the following: the last line of this Article imposes the sanctions in case of the absence of the passenger ticket *or if the passenger ticket does not contain all the particulars indicated,* thus the sanction becomes too severe if it operates upon a simple omission or on the carelessness of an airline employee—the committee came to agreement on this point of view, and in the last paragraph, it took out the words:
>
> *'or if the ticket does not contain the particulars indicated above.'*
>
> • • • • •
>
> "M. Gianini (Italy)—I would like to have the Reporter give us the Article as it now reads.
>
> "M. de Vos. It is the same text as that in the draft . . . with the elimination in the last paragraph of the words, *'or if the ticket does not contain the particulars indicated above'*." [8]

As finally adopted by the delegates, therefore, the sanction in Article 3(2) is expressly limited to the situation where no passenger ticket is deliverd. IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838, p. 129 (1930).

---

[8] IIème Conference Internationale de Droit Prive Aerien, ICAO Doc. 7838, pp. 100-101 (1930). (Translation and emphasis ours.)

The intent of the parties to the Treaty that the imposition of this sanction should be so limited, could hardly be clearer. Yet, by judicial decision, the majority of the Court below have accomplished what was expressly considered and flatly rejected by the parties before final adoption of the Treaty. The majority, to find support for their decision, turn to the spirit of inapplicable cases[9] rather than to the clear intent of the parties to the Treaty, expressed not only in the plain language of the Treaty itself, but also in the "legislative history" of the Treaty.

(c) The majority of the Court below have adopted a position diametrically opposed to the position of the Government of the United States that the Warsaw Convention does not require "notice" in the passenger ticket of the applicability of the Treaty limits of liability. At the Hague Conference in 1955, the United States proposed an amendment to Article 3(2) to extend the present sanction to cover situations where the passenger ticket fails to notify the passenger that the Treaty limits the carrier's liability for personal injury or death. The United States strongly urged this amendment. Extensive debate ensued, during the course of which the delegates to the Conference repeatedly recognized that the Warsaw Convention does not require any such notice in the passenger ticket, and that the sanction in Article 3(2) does not apply where the passenger ticket fails to make reference to the applicability of the Warsaw Convention.[10] The other nations

---

[9] *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); *Warren* v. *The Flying Tiger Line, Inc.*, 352 F. 2d 494 (9th Cir. 1965). Both of these cases dealt with the timeliness of the ticket delivery, and whether the carrier had accepted a passenger without a passenger ticket having been delivered, within the meaning of Article 3(2). Neither case dealt with the point here in issue. Nevertheless, the majority rely, "quite illogically" in the opinion of Judge Moore, on these cases to support their position.

[10] I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686—LC/140 pp. 65-91 (1955).

at the Hague ultimately agreed to adopt the amendment to Article 3(2) proposed by the United States. This amendment as adopted reads:

> "2. The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, *or if the ticket does not include the notice required by paragraph 1(c) of this Article,* the carrier shall not be entitled to avail himself of the provisions of Article 22." I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 p. 134 (1955). (Emphasis added.)

The United States has never ratified the Hague Protocol, nor does it appear probable that it ever will. Therefore, the effect of this decision is not shortly to be nullified by Treaty amendment. See, S. EXEC. DOC. H, 86th Cong. 1st Sess. (1959); S. EXEC. REPT. No. 3, 89th Cong. 1st Sess. (1965); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 HARV. L. REV. 497, 504-516, 532-546 (1967).

If the decision of the majority of the Court below is to be representative of the present position of the United States, then the Executive Branch of the Government will be placed in the position of having sought a wholly unnecessary amendment to Article 3(2) in 1955.

(d) The majority decision of the Court below is in direct conflict with every authority which has ever considered the adequacy of the statement as to the applicability of

the Warsaw Convention contained in all of the standard airline transportation documents, whether it be the passenger ticket, baggage check, or air waybill. Furthermore, the decision is in direct conflict with every authority on the question of whether the penalty of absolute unlimited liability applies where the passenger ticket fails to contain any of the particulars listed in Article 3(1). See, *Seth* v. *British Overseas Airways Corporation*, 329 F. 2d 302 (1st Cir. 1964), *cert. denied*, 379 U.S. 858 (1964); *Grey* v. *American Airlines, Inc.*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956), *affirming* 95 F. Supp. 756 (S.D.N.Y. 1950); *Eck* v. *United Arab Airlines, Inc.*, 20 A.D. 2d 454 (1st Dep't 1964), *rev'd on other grounds*, 15 N.Y. 2d 53 (1964); *Manufacturers Hanover Trust Co.* v. *American Airlines, Inc.*, 23 A.D. 2d 832 (1st Dep't. 1965); *Samuel Montague & Co.* v. *Swiss Air Transport Co.* [1966], 1 Lloyd's Rep. 323; *Preston* v. *Hunting Air Transport, Ltd.*, 1956 U.S. Av. R. 1 (Q.B.D. 1956); DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL LAW ¶251 (1954); SHAWCROSS AND BEAUMONT, AIR LAW ¶406 (2nd ed. 1951); GOEDHUIS, NATIONAL AIRLEGISLATION AND THE WARSAW CONVENTION 156-7 (1937).

All the foregoing authorities have given recognition and effect to the very keynote of the Warsaw Convention, which is uniformity throughout the world. Against this wall of uniform authority, the decision of the majority of the Court below now stands alone.

2. The good faith and integrity of the United States in its relations with other nations have been compromised by the majority decision of the Court below. There are some ninety nations which are parties to the Warsaw Convention.[11] What reliance can these other nations place upon

[11] U.S. DEPT. OF STATE, PUB. NO. 8188, *Treaties in Force* 235 (1967).

the international commitments undertaken by the Government of the United States if the Courts of the United States are at liberty to effectively nullify the clear intent of the parties to the treaty by "judicial fiat"? This is the basic consideration underlying the questions presented herein, and a final resolution of these questions by the Supreme Court is necessary.

Some international repercussions have already resulted from the decision of the Court below. More serious ones can certainly be expected. The Government of the United Kingdom have under consideration the question whether they should withdraw altogether from the Warsaw Convention in order to protect themselves from the devastating results of this decision. The United Kingdom, at least, is clearly not prepared to expose its carriers to unlimited liability without fault.

On February 7, 1967, a Member of Parliament raised these questions in the House of Commons:

> "If the [*Lisi*] decision is unreversed, will the Government give consideration even to withdrawal from the Warsaw Convention on these grounds? What steps are being taken to reverse the effect of this decision?" [12]

On behalf of the Government, the Minister of State, Board of Trade, Mr. J. P. W. Mallalieu, replied:

> "This Lisi case is being watched by the British Government and the experts of the International Civil Aviation Organisation are watching it with the greatest care. Depending on what the final decision is, we shall have to decide then what action we can take. I am

[12] HOUSE OF COMMONS: 740 OFFICIAL REPORT 139 (8 Feb. 67), Col. 1576. The full text of these Parliamentary proceedings is printed in Appendix C, commencing page 54.

grateful to hon. Members for raising this matter which is clearly of great importance."[13]

3. The majority decision of the Court below, in holding that the standard airline passenger ticket and baggage check[14] do not meet the requirements of the Warsaw Convention, is in direct conflict with the holding of the First Circuit in *Seth* v. *British Overseas Airways Corporation*, 329 F.2d 302 (1st Cir. 1964), *cert. denied*, 379 U.S. 858 (1964). In the *Seth* case the challenge was made against the statement in the passenger ticket and baggage check referring to the applicability of the rules of the Warsaw Convention, upon the basis of the mandatory requirements of Article 4 as to the contents of the baggage check.[15] The passenger ticket and baggage check involved in *Seth* was identical to the documents involved herein.[16]

The Court of Appeals for the First Circuit held that the statement contained in the standard IATA passenger ticket and baggage check, referring to the applicability of the rules of the Warsaw Convention to the transportation, complied with the mandatory requirements of Article 4.

The majority of the Court below, however, have held that the same document does not comply with what the majority conceive to be a mandatory requirement in Article

---

[13] HOUSE OF COMMONS: 740 OFFICIAL REPORT 139 (8 Feb. 67), Col. 1591.

[14] In use by all members of the International Air Transport Association (IATA) and approved as to form and content by the Civil Aeronautics Board in 1957. *Pan American World Airways, Inc., et al., Conditions of Carriage and Related Traffic Regulations*, 24 C.A.B. 575 (1957).

[15] The standard passenger ticket and baggage check are one and the same document.

[16] *Seth* v. *British Overseas Airways Corporation*, 329 F. 2d 302 (1st Cir. 1964), *cert. denied*, 379 U.S. 858 (1964), Record Appendix to Brief of Appellant BOAC, pp. 13 and 16.

3 dealing with the passenger ticket, and also fails to satisfy the mandatory requirements of Article 4 as to the contents of the baggage check. The majority decision holds that the passenger ticket and baggage check are inadequate because the type used is too small to be either noticeable or readable. In so holding, the majority of the Court below have placed the Second Circuit in direct conflict with the First Circuit on the legal sufficiency of the same document under the Treaty.

4. In holding that, as a matter of law, the standard airline passenger ticket and baggage check are unreadable, the majority of the Court below have deprived petitioner of a jury trial on this issue in violation of the Seventh Amendment to the United States Constitution. U.S. CONST. amend. VII. Surely the question of print readability should be decided by a jury. See, *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355 (1962). As recognized by Judge Moore in his dissenting opinion:

> "Furthermore, for the courts to say that a jury could not reasonably have found that the ticket gave the passenger the required notice is, upon a motion for partial summary judgment, to usurp the time-honored function of the jury." (R. 75a).

5. Petitioner is informed that the International Air Transport Association (IATA) and the Air Transport Association of America (ATA) are seeking leave to intervene and file briefs as *amici curiae* in support of this petition. IATA is the Association of the world's principal scheduled air carriers. ATA is the Association of the principal scheduled air carriers of the United States. Both of these Associations will urge that this petition be

granted in view of the tremendous and far-reaching impact of this decision on the airline industry at large. Petitioner adopts the arguments and reasons advanced by both of these Associations as additional reasons for the granting of this petition.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

AUSTIN P. MAGNER,
GEORGE N. TOMPKINS, JR.,
Counsel for Petitioner.

ROBERT P. GORMAN,
JOHN H. MONTGOMERY, JR.,
WILLIAM L. SCHIERBERL,
of Counsel.

March 20, 1967

Certificate of Service

I hereby certify that I have, this 20th day of March, 1967, served the foregoing petition for a writ of certiorari upon respondents by depositing same in a United States mail box at One Rockefeller Plaza, New York, New York 10020, with first class postage prepaid, addressed to Theodore E. Wolcott, counsel of record for respondents, at his post office address, 36 West 44th Street, New York, New York 10036.

March 20, 1967

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner